

- (1) The parties agree claimant was injured on May 2, 1998, when a nail gun accidentally fired and drove a nail into claimant's heart.
- (2) Claimant is a framer who was employed full time for a local residential construction company. Respondent is a landscaping and nursery business.
- (3) Respondent had started to build a relatively simple structure that would be used to shade trees and plants. Claimant agreed to work on the project in his spare time for \$15 per hour.
- (4) Respondent furnished the materials for the project. On several occasions, respondent directed claimant to change the way the structure would be built due to the materials respondent had on hand from earlier construction projects.

(5) Claimant used his own hand tools and ladders to work on the project, except for two chain saws that respondent provided.

(6) The project was expected to last three to seven days depending upon the number of individuals who worked on it. Respondent assigned several of its employees to assist claimant.

CONCLUSIONS OF LAW

(1) The Workers Compensation Act is to be liberally construed to bring employers and employees within its provisions and protections.¹

(2) Workers compensation statutes are to be liberally construed to effect legislative intent and award compensation to a worker where it is reasonably possible to do so.²

(3) It is often difficult to determine in a given case whether a person is an employee or independent contractor since there are elements pertaining to both relations that may occur without being determinative of the relationship.³

(4) There is no absolute rule for determining whether an individual is an independent contractor or an employee.⁴

(5) The relationship of the parties depends upon all the facts and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.⁵

(6) The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result which is to be accomplished. It is not the actual interference or exercise of the control by the employer but the existence of the right or

¹K.S.A. 1997 Supp. 44-501(g).

²Kinder v. Murray & Sons Construction Co., Inc., Docket No. 76,296 (Kan. 1998).

³Jones v. City of Dodge City, 194 Kan. 777, 402 P.2d 108 (1965).

⁴Wallis v. Secretary of Kans. Dept. of Human Resources, 236 Kan. 97, 689 P.2d 787 (1984).

⁵Knoble v. National Carriers, Inc., 212 Kan. 331, 510 P.2d 1274 (1973).

authority to interfere or control, which renders one a servant rather than an independent contractor.⁶

(7) In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are (1) the existence of a contract to perform a certain piece of work at a fixed price, (2) the independent nature of the worker's business or distinct calling, (3) the employment of assistants with the right to supervise their activities, (4) the worker's obligation to furnish necessary tools, supplies, and materials, (5) the worker's right to control the progress of the work, (6) the length of time for which the worker is employed, (7) whether the worker is paid by time or by job, and (8) whether the work is part of the regular business of the employer.⁷

(8) For purposes of the Workers Compensation Act, claimant's relationship with respondent was more in the nature of an employee than that of an independent contractor. That conclusion is based upon the facts that (1) claimant was not engaged in an independently established trade or business, (2) claimant was paid on an hourly basis rather than for a completed project, (3) respondent provided the materials for the project rather than allowing claimant the freedom to obtain those necessary, (4) respondent provided individuals to assist claimant, and (5) respondent retained control over the manner that the project was to be completed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that for workers compensation purposes the relationship of employer-employee existed between claimant and respondent on the date of accident; that the contrary finding contained in the preliminary hearing Order dated June 4, 1998, entered by the Administrative Law Judge should be, and hereby is, reversed.

IT IS SO ORDERED.

Dated this ____ day of July 1998.

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
William L. Townsley, III, Wichita, KS
Jon L. Frobish, Administrative Law Judge

⁶Wallis, at 102-103.

⁷McCubbin v. Walker, 256 Kan. 276, 886 P.2d 790 (1994)

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DOCKET NO. 233,582

Philip S. Harness, Director